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In the Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 69.

UNITED STATES, APPELLANT,
vs.
THEODORE DALCOUR, ET AL., APPELLEES.

Supplemental brief of WILLIAM W. DEWHURST, WILLIAM A. BLOUNT AND A. C. BLOUNT, JR., Attorneys for the Appellees.

H. S. White, Printer, Pensacola.

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At the time of receiving the printed brief for the appellant, our former brief was, except as to the last few pages, in print, and the type distributed, so that the matter in this brief could not be included therein.

In the absence of that brief and of a knowledge of what assignments of error would be insisted upon by appellant, we have discussed many questions which the appellant has not broached nor argued, and the Court is relieved of a consideration of them. Such are our discussions of the first assignment of error, (Pages 9 to 15 of our former brief,) of the second assignment of error on pages 16 to 29, (except sub-division 4 of our discussion, on pages 17 to 21,) and of the third assignment of error (Pages 29 to 31, inclusive,) which the Court need not consider.

For the further convenience of the Court, we group our discussions in our former brief of the points which are argued by appellant in the same manner in which it groups its points and we add further answers to them.

I.

The amendments to the original petition did not make different causes of action barred, by the limitation of the Act of 1860, as extended by the Act of 1875.

The appellant, under this head, attacks two amendments allowed by the Court below, to-wit:

A. The amendment filed December 14, 1878, (Transcript, 15 to 18,) making the heirs of James Innerarity and John Innerarity parties, and

B. The amendment at the final hearing (May 25, 1904, Transcript, p. 106,) made by stating the reliance of the petitioners on the grant made February 20, 1818, and altered so as to purport to have been made on January 10, 1818.

A. We have discussed this at length in our discussion of the fourth assignment. (Pages 31 to 50 of our former brief.)

We therein showed:

That the order, being an order allowing an amendment, will not be reviewed by this Court. (Page 32.)

That the change from a reliance upon a grant alleged to have been made to John Forbes to a reliance upon a grant alleged to have been made to John Forbes & Company was not a change of the cause of action. (Pages 33 and 34, inclusive.)

That the introduction, by amendment, of the Innerarity heirs, who were co-tenants of John Forbes' heirs and interested in the same land and the same question, was not a change of the cause of action and was permissible. (Pages 34 to 44, inclusive.)

That this Court has frequently ruled that parties situated as were John Forbes' heirs in this case could procure a decree in their own favor and in favor of other persons interested in the property and title, upon general principles, and because the United States is concerned only in the question as whether the lands were segregated by Spain from the public domain and not in the "contest between persons claiming *ex post facto* the grant." (Page 35, bottom, pages 36 to 39, inclusive)

That, in fact, the amendment was unnecessary, because the relief could have been granted without it and hence, of course, it did not create a new cause of action. (Pages *supra* and page 39, bottom, and 40 and 42,) and

That these amendments, creating no new cause of action, it was, of course, immaterial whether they were made before or after the limitation had expired. (Page 42, bottom, pages 43 to 50, inclusive.)

The decisions of this Court, cited and quoted in the pages of our brief above enumerated, are particularly strong in favor of our contention.

As against this wealth of authority, the appellant relies upon three cases;

Gray vs. Trapnell, *et. al.*, 23 Ark., 512;
United States vs. Heirs of Innerarity, 19 Wall., 595;
United States vs. Watkins, 7 Otto, 219.

We have not access to the first case, but if it decides, as it seems to do, that a tenant in common cannot recover from a stranger the whole interest in land in controversy and hold for his co-tenants, then it is opposed to the great weight of authority, (Pages 41 and 42, our former brief.)

Davison vs. Wallingford, 88 Tex., 619; 32 S. W. Rep. 1030;
Foster, *et. al.*, vs. Hackett, 112 N. C., 546; 17 S. E. Rep. 426;
7 Ballard on Real Property, Sec. 826;
Note, 50 Am. State Rep. pp. 841, *et. seq.*

And approved by this Court, so far as it could approve a purely local question.

Hardy vs. Johnson, 1 Wall., 371.

And evidently would be approved by the Supreme Court of Florida, where the land lies.

Simmons vs. Spratt, 26 Fla., 461.

In the second case there was no connection between the original petitioner, who had no title, and the attempted intervener, who did not file claim in time. That is to say, the person who finally sought confirmation was an interloper, showing no right connected with the original petitioner. Here, upon the contrary, as we have shown, the petitioners could have been held as Trustees for their co-tenants, and thus the whole land was in controversy from the beginning. The quotation by the appellant, (P 16 of its brief,) shows plainly the position of this Court on that subject, while its position upon a case like the one at bar is shown with clearness by the decisions cited on pages 36, 37 and 38 of our brief.

In the third case, Mrs. Simpson had no standing in Court, because she had parted with her undivided interest. The claim of the Innerarities had been already rejected. If Mrs. Simpson had retained her interest, there could be no doubt that under the authority of the cases which we

have cited, and particularly of United States vs. Morant, 123 U. S., 343, the title could have been confirmed in the Watkins heirs for themselves and for her.

b. This Court will not reverse because of the allowance by the Court below of the amendment at the hearing so that the petitioners might state a reliance upon the grant made on February 20, 1818, and altered so as to purport to have been made on January 10, 1818.

We have heretofore discussed this at large in our former brief, under the fifth assignment of error. (pp. 50-70 inclusive.)

We therein showed,

a. That the order of the Judge permitting the amendment is not reviewable here, since it is the ordinary case of amendment at the hearing of a bill in chancery to meet the proof. (Paragraph a, p. 81;)

b. That there was no objection or exception by the United States to the allowance by the Court of this amendment, but on the contrary, the allowance was procured by the defendant, (pp. 51 and 52;)

c. That if the defendant, the United States, had at any time a right to object to the allowance of the amendment, it waived it by pleading over. (p. 52;)

d. That even without the amendment the difference in the date of the grant pleaded and the one in proof would not have been a variance preventing a recovery upon the original grant in proof. (pp. 52-60;)

e. That if it would otherwise have been a variance, none can be insisted upon by the United States, for not only did it not object to the introduction of the grant, but it itself introduced it. (p, 60;)

f. That a variance does not prevent a recovery, unless a defendant has been misled and a fair trial prevented. (pp. 60 and 61;)

g. That no new cause of action is introduced by the defendant, and hence it related back to the filing of the petition, and the limitation did not bar a reliance upon the grant contained in it. (*Passim*, pp. 52-61;)

The appellant has nothing to oppose to this, except the assertion that the change from the original petition created a new cause of action, barred by the limitation of the Acts of 1860 and 1872, and the citation of the cases of

Union Pac. R. R. Co. vs. Weyler, 158 U. S., 285; and,
Kendall vs. United States, 107 U. S., 123.

The latter case does not bear at all upon this, and the former is, so far as the point involved is affected, only a declaration of the general doctrine which tend as much to support our contention as that of the appellant, since it expressly recognizes the Law to be that an amendment which does not introduce a cause of action "different from that originally asserted," does not introduce a new cause of action.

Nor does the case of Sicard vs. Davis, 6 Peters, 124, cited in the latter case, bear on this. In that case, there was an amendment changing the demise relied upon in the original petition. The effect of this was to deraign the title from persons other than those from whom it was deraigned in the original petition, and there was thus an abandonment of the title originally relied upon, and the assertion of, as said by the Court, "a demise from a different party asserting a different title."

It is not so in this case, however, for here the same grant from the same grantor, covering the same property, is the foundation of the petitioners' claim throughout the whole proceedings, and the only change is, the change of the date of the making of the grant. Instead of being within the case of Sicard vs. Davis, *supra*, this case is within,

Blackwell vs. Patton, 7 Cranch, 471,

where an amendment altering the date of a demise in ejectment was allowed.

II.

This claim is not barred by the former adjudication made by Judge Brackenridge, under the Act of May 23, 1828.

We have already discussed this, (pp. 72-79, inclusive, of our former brief.)

We therein showed that Judge Brackenridge having decided that the grant was made after January 24, 1818, had no jurisdiction to decide anything further. (pp. 73 and 74;)

That he did not attempt to decide anything further than this, (pp. 75 and 76;) and,

That his decision was upon the rights of the parties as they then existed, under the Treaty of 1819, and could not be a bar to the assertion of a right under the Act of 1860, and that this resulted from

The general law of estoppel. (pp. 76 and 77;)

Decisions upon the Statute directly in point, but not relating to Florida lands, (pp. 77 and 78,) and;

Decisions under this Act, especially as to Florida lands, (pp. 78 and 79.)

In answer to this the appellant seems to contend,

1. That Judge Brackenridge decided the grant to be null and void because altered, and that the Act of 1860 did not rehabilitate it after such decision.

2. That Judge Brackenridge had authority to decide that the alterations avoided the grant, because the Act of 1860 conferring authority upon him, required him, "by a final decree to settle and determine the question of the validity of the title, according to the law of nations, the stipulations of any treaty," etc., and

3. That the same Act required the claimants presenting the claim "to particularly state the date of the grant, concession, etc:" that the claim in this case stated the grant to be of date, February 10, 1818, and thus asserted it to be a grant not annulled, and that hence, the decision of the Judge was not because of the annulment by the treaty, but because of the voidness of the grant by reason of the alterations in it.

1. We have already discussed the question whether Judge Brackenridge did decide the grant to be void because of the alterations in it. (pp, 106-108, former brief.)

We have but to add that the pertinency of the ascertainment of whether he decided the grant to be null by reason of its alterations is because of the plea of estoppel by appellant setting forth that the judgment of Judge Brackenridge was a rejection "upon the merits and not otherwise," and that "the claim and cause of petition so finally adjudicated was the same claim, title and cause of petition as that whereon the present petitioner have founded their petition and no other."

But the appellant cannot show under the principle of estoppel by judgment, that there was any adjudication by Judge Brackenridge that the grant was void because

of alterations in it such as to estop upon that ground any subsequent attempt to assert rights under it, for,

In order that an estoppel as to any point decided by a judgment may arise, it must appear that a decision of that point was necessary for the making of the judgment.

Packet Co. vs Sickles, 5 Wall., 592.

Here it cannot be contended that a decision upon the effect of the alterations was necessary to the rejection of the grant, since there was patent upon the face of the case as it then stood, and was in the mind and opinion of the Court, the fact that the grant, whether otherwise valid or invalid, was not made before January 24, 1818, and that a decision on this ground must be had without reference to any other ground.

But even if a decision on the nullity of the grant because of alteration was one which could have been made contemporaneously with the decision that the grant was invalid because made after January 24, 1818, yet, in order that there may be an estoppel because of such decision as to the effect of the alterations, it must clearly appear that the decision was upon that ground, for,

"If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel when pleaded, and nothing conclusive in it when offered as evidence."

Russell vs. Place, 94 U. S., 610;

Fabey vs. Esterly, etc., Co., 3 N. Dak., 223: 55 N. W., 581.

And one who pleads an estoppel by judgment which might have proceeded on two or more facts, must prove that it was decided on the particular fact as to which he seeks to assert the estoppel.

Zoeller vs. Rilet, 100 N. Y., 107;

Louis vs. Ocean, etc., Co., 125 N. Y., 348: 26 N. E., 303;

Dygert vs. Dygert, 4 Ind. App., 280: 29 N. E., 491.

In this case it is impossible for anyone to say that the court rejected the petition upon the ground of the alterations of the grant instead of upon the ground of the want of jurisdiction of the Court to confirm any grant made after the date fixed in the Treaty. The mind of this Court cannot rest with any certainty of conviction upon the idea

that the court below rejected the claim as (*i. e.,*) because fraudulent, when there exists upon the face of the opinion of the Judge another and adequate reason, one which would compel such a decision, that is, the annulment by the Treaty and the prohibition of the act of 1828 against the Court's taking any cognizance of any claim annulled by it.

2. We do not comprehend, and, therefore, do not undertake to answer this contention. Clearly, the direction of the act of 1828 as to the making of final decree and adjudication had reference only to those claims of which the court might have jurisdiction, and had no reference to those of which it had no jurisdictlon. Nor was the right to adjudge the merits of claims of which it had no jurisdiction, attempted to be conferred.

3. Nor is this contention clearer. Appellant's idea seems to be that because the grant was stated in the petition before Judge Brackenridge to have been made on January 10, 1818, therefore, the court was compelled to accept that date as the true date, and to pass upon the genuineness of a grant of that date and could not adjudicate that the grant had been made after the time permitted by the treaty, even though that fact appeared in evidence.

Why not? The protection of the United States in its rights under the Treaty was not only the duty of the District Attorney in his conduct of the case, but was the duty of the Court. A Court will decline jurisdiction where it appears that it has it not, whether the suggestion be made by a litigant or whether it arises in the mind of the court itself.

Besides, the defendant, the United States, in that suit expressly denied "the truth of all the statements and matters of fact in the said documents asserted and set forth," (Tr. p. 75,) (the documents being the grant relied on and the statements relating thereto,) and expressly refused to admit the execution of the grant and title papers. (Tr. p. 74.)

On this issue, the trial was had. The petitioners, in order to sustain their case, which required a showing of the date of the grant to be before January 24. 1818, and thus the jurisdiction of the court, introduced an exemplification. To meet this, the defendant introduced the Registro, which showed the date to be February 20, 1818, and, therefore,

showed the court to have no jurisdiction. There was no reason and no room for adjudication upon the effect of the alterations, for in the face of the patent want of jurisdiction of the court, it is clear that rejection was because of that want of jurisdiction.

III.

This Act of June 22, 1860, as extended by the Act of June 10, 1875, does authorize the confirmation of a grant of lands in Florida, East of the Perdido River, made after January 24, 1818.

This proposition is the reverse of the proposition of the appellant. (See its brief, p. 34)

We have already discussed this matter, (pp. 94 to 105, inclusive, our former brief.)

We will not follow the long and interesting history in that portion of appellant's brief, but content ourselves with a review of the statement and argument to support it.

The first of these is that the Act of 1860 does not apply to grants of land

East of the Perdido River
Made after January 24, 1818.

The appellant, however, admits that the Act did apply to lands in Florida, East of the Perdido River, for its counsel say (pp. 53 and 54 of their brief:) "It is not contended that enforceable claims are confined to those in the disputed territory—the territory between the Mississippi and the Perdido."

The admission, however, was not needed, for the Act expressly extends to lands "lying within the States of Florida," etc., and the State of Florida lay and lies entirely East of the Perdido River and outside of the disputed territory.

The only thing left, then, is the inquiry as to whether the Act of 1860 is intended to embrace grants made after the date fixed in the treaty, to-wit; January 24, 1818.

The language of the Act is express that it related to all grants "bearing date prior to the cession to the United

States of the territory out of which said States were formed, or during the period when any such [foreign] Government claimed sovereignty, or had the actual possession of the district or territory in which the lands so claimed are situated." Applying this to Florida and eliminating the question of grants made after a cession, but while the ceding sovereignty was in possession, it is clear that all grants made prior to the cession—the date of the treaty, Feb. 22, 1819,—were included in the Act. The grant in question was made before that time and, hence, it is included.

In our opinion the very purpose of the Act was to embrace grants in Florida made up to the time of an actual transfer of possession. Evidently and admittedly (p. 16, appellant's brief,) that was the purpose as to lands in the disputed territory, and there is no hint in the Act of 1860 of the application of a rule to the lands in the State of Florida different from the rule to be applied to lands in the disputed territory.

There were in 1860, probably, no grants in Florida, except those made after January 24, 1818, which had not been presented to the Commissioners or Courts and adjudicated, for Congress had passed act after act for decades giving the opportunity to grantees to have grants made before Jan. 1, 1824, presented and confirmed, and claimants must have availed themselves of these acts in all cases where they could do so, but the terms of the treaty and of the acts relating to Florida following it were so explicit in excluding grants made after January 24, 1818, that probably none had been presented, and certainly none had been confirmed, and it was this class of grants that the Act of 1860 was passed to relieve.

However this may be, the language of the Act is too plain for controversy and the decisions of this Court construing it, (pp. 90 to 105 of our former brief,) are too explicit to admit of doubt, especially the decision in the case of United States vs. Morant, 123 U. S , 335, upon this very class of claims.

Counsel for appellant say (p. 54 of their brief) that the act was intended to give relief to claims in the territory East of the Perdido "resting upon the same or similar circumstances" as those in the disputed territory. They fail to point out, however, any dissimilarity in the two

classes of claims, or any design in Congress to make a dissimilarity any basis for discrimination. In fact, as we have shown on page 101 of our former brief, the general principle upon which Congress was desirous of relieving both classes of claims was exactly the same; that is to say, since in the case of the disputed territory, because of the want of title in the sovereign, and in the case of Florida, because of the treaty obligation of the sovereign, and in both cases because of adverse legislation of Congress the titles were not enforceable, it was thought equitable and right that they should be made enforceable.

Counsel answer their question, "what is the character of claim intended to be sustained by this Act," by saying that the claim must rest "upon some right, not necessarily legal, but at least equitable, which imposes an honorable or moral obligation upon the present Government to recognize it." This, at best, furnishes a very loose foundation upon which to argue, but as applied to the two classes of cases under consideration, it must be clear that if there be any difference in the obligation of the United States Government, the weight of the obligation must be in favor of Florida claimants who, like the claimants in this case, for valuable considerations, received perfected grants from a sovereign which had the power to grant and whose claims were afterwards arbitrarily annulled by that sovereign, and not in favor of claimants in the disputed territory who derived from a sovereign who had already divested himself of his sovereignty and of the power to make grants, such claimants being in many cases mere gratuitous grantees, without any present or past consideration passing from them to the sovereign.

It is also said by counsel for appellant that if it be held that this grant is covered by the terms of the Act of 1860, it must also be held that the grants of Punon Rostro, deVargas and Alaron are covered by the terms of the act.

This does not necessarily follow, for the reason that the ratification by the King which, of course, became a part of the treaty, expressly excepts these grants by name, and the rule is established that a general reference, such as is found in the Act of 1860, will not include particulars such as are found in the ratification of the

treaty by the King of Spain. The grant in question here is not specified in the treaty, but came within the general exceptions which are clearly embraced within the language and spirit of the Act of 1860.

It was understood between the contracting parties at the time that only the three grants expressly named in the ratification were intended to be annulled. President Monroe, in his message sent to Congress on December 7, 1819, says, "It will be seen by the documents transmitted herewith that the declaration (ratification) mentioned, relates to a clause in the eighth article concerning certain grants of land recently made by his Catholic Majesty in Florida, which it is understood had conveyed all the lands which until then were ungranted. It was the intention of the parties to annul these latter grants, and that clause was drawn for that express purpose and none other."

Besides this, even though the results suggested by the counsel would be reached, yet that consideration would not justify this Court in disregarding the plain language of the statute, the circumstances under which it was passed, the classes of cases which it was intended to cover, and in failing to give any meaning whatever to the provisions of the act so far as the lands in Florida are concerned.

IV.

The petitioners are within the provisions of the Act of 1860.

This statement is in answer to the statement of counsel for appellant on page 69 of their brief that the petitioners are not within the provisions of this act. Under this they contend that Judge Brackenridge rejected this claim, that he was a public officer, and that such rejection by him bars the Court, under the Act of 1860, from a consideration of the claim.

We have discussed this fully on pages 105 to 108 of our former brief and need not further discuss it.

Respectfully submitted,

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ADDITIONAL BRIEF FOR APPELLEES.

The United States suggests, rather than argues, that the grant in question was not valid because the whole territory had already been covered by a grant to Rostro. The answers to this are:

1. The general grant to the count of Puñon Rostro on February 6, 1818, does not impair the validity of the title made to Forbes & Company by Cienfuegos, February 20, 1818. By the terms the grant to Rostro was a general grant, without injury to a third party. (See list of grants annulled by the treaty of 1819, pages 68 to 71, Laws of United States Respecting Public Lands, Gales & Seaton, 1828.)

A general grant, without injury to a third party, does not

prevent a specific grant within the limits, though subsequent in date.

Fremont *vs.* United States, 17 How., 558 (15-247).
Henshaw *vs.* Bissell, 18 Wall., 255.
Ledoux *vs.* Black, 18 How., 475 (16-457).
Waterman *vs.* Smith, 13 Cal., 407.
Miller *vs.* Dale, 92 U. S., 473 (23-735).
United States *vs.* Armijo, 5 Wall., 445 (18-492).

In the Case in 17 Howard, Chief Justice Taney says:

"It is true that if any other person within the limits where the quantity granted to Alvorado was to be located had afterwards obtained a grant from the Government by specific boundaries before Alvorado had made his survey, the title of the latter grantee could not be impaired by any subsequent survey to Alvorado; as between the individual claimants the title of the party who had obtained a grant of the specific lands would be the superior and better one."

The court says that grant to Alvorado was positive and plain and conveyed to him a present and immediate interest.

So the grant to Rostro may have been of a present interest, but it was general in terms, being "all the waste lands not heretofore ceded in Florida," between the Gulf of Mexico and the United States, the Perdido and St. John's rivers. Rostro's grant or concession was canceled by resolution of the Cortes October 5, 1820, with the grantee's assent, he receiving as indemnity a large grant of Crown lands of Spain. A better reason why the concession to Rostro did not prevent the King's deputy from indemnifying Forbes & Co. with the grant of lands in West Florida in February, 1818, is that Rostro's grant, emanating from the King, was upon terms and was not a complete title. In his letter, dated Washington, November 16, 1818, Don Luis de Onis, Envoy of Spain, declares that the late grants made by the King were made with a view to promote population and cultivation, and that

in consideration of the grantees not having complied with the essential conditions of the cession, as has been the fact, *they may be declared null and void* (page 26, Message from the President to Congress, December 7, 1819, 1 Executive Papers, 1 Session, 16 Congress, 1819-1820).

2. This grant made to Rostro was a grant upon condition, and the right to perfect it by the performance of the conditions made the title in Forbes & Company perfect, even though it had been, up to the time of the failure to perform conditions by Rostro, subordinate to the title granted to Rostro.

2.

We regret to be compelled to advert to a brief filed on October 29, 1906, purporting to be a brief on behalf of the Forbes heirs.

We suggest, with modesty, that it adds nothing to the discussion of our brief already filed, so far as the merits are concerned, and that the sole purpose of it is to ask this court to ignore the claims of the heirs of John Innerarity and James Innerarity and to confirm the grant in question to the Forbes heirs alone.

We submit as conclusive answers to this suggestion and request:

1. That the undersigned attorneys represent a portion of the Forbes heirs and, as they believe, the larger portion, and that those represented by them do not join in the request made in the brief mentioned; so that the court has before it only a request of an indefinite number, of what appears to be upon the record a one-third interest, asking that the wishes of a portion of that one-third and the interests of the whole of the other two-thirds shall be ignored.

2. That we have already shown in our former briefs that the Innerarity heirs were properly made parties to the proceeding and are entitled to share in the land and scrip to be awarded by the court, if the claim be adjudged valid by this court.

3. That the suggestion made in the brief, that there is no proof of the interest of the Innerarities and of the heirship of those persons purporting to represent them, is without merit. As to both of these matters, they stand upon exactly the same footing as the Forbes heirs, for as to each there is no proof. So far as the interests of John Forbes and of his copartners are concerned, they are both covered by and recognized in the grant itself, and his interest is no more entitled to protection than theirs. So far as proof of the heirship of the present claimants is concerned, it has been made, both as to the Forbes heirs and as to the Innerarities, only by the failure of the United States to deny and by its admission, to be found in the first paragraph of its answer, on pages 67 and 68 of the transcript, in which it is expressly admitted that the complainants, including the Forbes heirs and the Innerarity heirs, are the heirs and legal representatives of Forbes and the Innerarities respectively. Indeed the assertion of interest of the persons claiming under the Forbes heirs is not as well sustained as the interests of the Innerarities, since the assertion of the interest of the former is contained only in the petition filed by Alex. T. Steele, shown on pages 7 to 15 of the transcript, while the interests of the Innerarities are set forth on oath by one of the Forbes heirs. (See pages 15 to 17, Transcript).

4. That the heirs of Forbes and the heirs of Innerarity have been in accord in asserting and maintaining this claim for over thirty years, and not only has it been recognized by the Forbes heirs, as aforesaid, that the Innerarities were

interested largely in the claim, but side by side they have worked to the final end of obtaining a decree in the lower court; but not until the filing of the brief mentioned, on October 29, 1906, has there been a hint upon the record that it was not the desire of all the parties that the decree of the lower court should be affirmed as it stood, and that the respective rights of the parties as fixed in that decree, and as acted upon and acquiesced in by all of them for more than a quarter of a century, should be the permanent rights to be adjudicated by this court.

5. That to carry out the suggestion of the brief mentioned would be to allow all the Forbes heirs to avail themselves of the expenditure of the time and money of some of their number and of the Innerarities for three decades, without furnishing any equivalent therefor. The latter as much as the former have, through their various attorneys, prosecuted the suit, re-established the record, filed all pleadings, taken all evidence, and conducted every step; and yet the prayer of the brief is that these efforts shall be entirely disregarded and the fruit of them reaped by those who have not contributed at all.

6. That it would be unconscionable for the Forbes heirs to take the benefit of the decree rendered in the court below without its corresponding burdens. As to them, it is an entirety. They have not appealed and are in no position to ask the court to modify the decree. Admitting that it is within the power of the court to make such modification if it sees clearly that the rules of law or the principles of justice require, it is respectfully submitted that to make such modification in this case would be in violation of the rights of some of the parties, as shown by the record, and not required by the necessities of the case nor by any principle of justice apparent to us.

7. We respectfully submit that the equities may be fully settled in the district court upon affirmance of its decree, wherein that court reserved jurisdiction to carry its decree into effect (Record, pp. 131, 132).

Respectfully submitted,

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